Appendix A
Order of the Court

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 81-4150

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 1st day of April, one thousand nine hundred and eighty-two.

Present:
HON. JAMES L. OAKES,
HON. WILLIAM H. TIMBERS,
HON. RICHARD J. CARDAMONE,
Circuit Judges.

PHELPS CEMENT PRODUCTS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

BRICKLAYERS, MASONS, AND PLASTERERS' LOCAL UNION NO. 43 OF THE FINGERLAKES REGION,
Intervenor.

ORDER

This is a petition by Phelps Cement Products, Inc. seeking review of an order by the National Labor Relations Board and a cross-application by the Board for enforcement of that order. The order, issued on July 21, 1981, is reported at 257 N.L.R.B. No. 4. The Board found that the company violated sections 8(a)(5) and 8(a)(1) of the National Labor Relations Act, 29 U.S.C.

§§158(a)(5), (1), by refusing to bargain with Bricklayers, Masons, and Plasterers' Local No. 43 of the Fingerlakes Region, which the company had voluntarily recognized as the exclusive representative of an appropriate unit of the company's employees. We deny the company's petition for review and enforce the Board's order in full.

The company's first contention is that there is not substantial evidence on the record as a whole to support the Board's finding that the company voluntarily recognized the union as the bargaining representative for its sixteen production and maintenance employees and agreed to bargain with it. "Substantial evidence" has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971).

In this case the determination of whether the company agreed to recognize the union turned on whose testimony was to be credited. Walters, the union's business agent, testified that in a lengthy meeting on November 28, 1979, Haers, Sr. and Haers, Jr. — the company's chairman of the board and its president — agreed to recognize the union based on the authorization cards rather than go to an election. The Haerses testified, on the other hand, that they demanded an election.

The Board chose to credit Walters, a decision we cannot overturn under the substantial-evidence standard unless Walter's testimony was "hopelessly incredible . . . or flatly contradicts either a so-called 'law of nature' or undisputed documentary testimony," *NLRB v. Dinion Coil Co.*, 201 F.2d 484, 490 (2d Cir. 1952); *see NLRB v. Gogin*, 575 F.2d 596, 605 (7th Cir. 1978) (only in "exceptional circumstances" will resolutions of such conflicts in testimony be disturbed on review"). *Omni International Hotels, Inc., v. NLRB*, 606 F.2d 570 (5th Cir. 1979), is not, as the company insists, to the contrary. In *Omni International* the testimony by five persons that they were not hired because of their former union activi-

ties, which the Board credited, was contradicted by the undisputed fact that the employer had hired many union members, including some who had engaged in the same activity as the five witnesses. Moreover, the court in *Omni International* found that the Board's reasons for crediting these witnesses were unsound; the Board did not rely on those reasons in this case.

The company's attacks on Walters's credibility are not telling. It is not unusual for a person to forget the specific words spoken to him six months earlier. Nor does the General Counsel's and union's failure to call two people Walters spoke to about the meeting during the evening of November 28 undermine the testimony's credibility. The two witnesses would have added little, and the company could have called them in any case.

Furthermore, the Board's rationale for believing Walters rather than the Haerses is sound. Walters's testimony about that part of the meeting following his return is more comprehensive and specific than that of the Haerses. Since the Board reasonably concluded that this portion of the meeting was a "substantial segment" of the conversation, it was also reasonable to credit the witness whose account of that segment included several topics of conversation rather than the two topics the Haerses recalled, which could not have consumed a substantial amount of time. In sum, the Board's reliance on Walters's testimony was reasonable; its conclusion that the company voluntarily recognized the union is supported by substantial evidence.

The company next argues that the Board's decision is repugnant to the policies behind sections 7 and 9 of the National Labor Relations Act. Essentially the company contends that because the electoral process is favored, a union should be deemed the exclusive bargaining agent for a group of employees only if it has made a clear and unmistakable showing that the employer recognized the union. This position is without merit. The Board has explicitly rejected it, *see Lyon & Ryan Ford,*

Inc., 246 N.L.R.B. No. 2 (1979), *enforced*, 647 F.2d 745 (7th Cir. 1981); *Jerr-Dan Corp.*, 237 N.L.R.B. 302, 303 (1978), *enforced*, 601 F.2d 575 (3d Cir. 1979), as have the courts, *see NLRB v. Broad Street Hospital and Medical Center*, 452 F.2d 302, 304-05 (3d Cir. 1971); *NLRB v. Brown and Connolly, Inc.*, 593 F.2d 1373 (1st Cir. 1979). *See also NLRB v. A. Lasaponara & Sons*, 541 F.2d 992, 996 (2d Cir. 1976) ("that Lasaponara never signed the formal Recognition Agreement is immaterial"), *cert. denied*, 430 U.S. 914 (1977), As the Third Circuit explained in *Broad Street Hospital*, the Board's rule is supported by the possibility that rendering the parties unable to rely on the employer's recognition would produce industrial strife and discord. There is, moreover, no basis on which we can review the Board's policy. The company points to no statute that the Board's rule violates, and no indication that the Board lacks authority to adhere to the rule. As the First Circuit stated in *Brown and Connolly*, 593 F.2d at 1374, "[w]e consider such policy matters . . . to be outside our province."

The company also contests the Administrative Law Judge's limitation of its examination of Walters and other witnesses. The ALJ did not, however, abuse his discretion here, *see NLRB v. Baltimore Paint and Chemical Corp.*, 308 F.2d 75, 77-78 (4th Cir. 1962) ("The extent of examination and cross-examination of witnesses rests in the sound discretion of the [ALJ]"), in light of the significance of the information the company was seeking to elicit.

Finding no merit to the company's final argument, we deny its petition to review and grant the Board's cross-application for enforcement of its order.

/s/ William H. Timbers
/s/ James L. Oakes
/s/ Richard J. Cardamone

Appendix B
Decision and Order of the National Labor Relations Board

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 3—CA—9460

PHELPS CEMENT PRODUCTS, INC.

and

BRICKLAYERS, MASONS AND PLASTERERS' LOCAL UNION NO. 43 OF THE FINGERLAKES REGION

DECISION AND ORDER

On March 9, 1981, Administrative Law Judge Richard L. Denison issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, the Charging Party filed cross-exceptions and an answering brief,[1] and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclu-

1. We hereby grant the Charging Party's unopposed Motion to correct the transcript.

2. The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings. We also find totally without merit the Respondent's allegations of bias and prejudice on the part of the Administrative Law Judge, nor do we perceive any evidence that the Administrative Law Judge prejudged the case, made prejudicial rulings, or demonstrated a bias against the Respondent in his analysis or discussion of the evidence.

sions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, and hereby orders that the Respondent, Phelps Cement Products, Inc., Phelps, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C.
July 21, 1981

/s/ John H. Fanning, Chairman
/s/ Howard Jenkins, Jr., Member
/s/ Don A. Zimmerman, Member
NATIONAL LABOR RELATIONS BOARD

APPENDIX C
DECISION OF THE ADMINISTRATIVE LAW JUDGE

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Case 3-CA-9460
PHELPS CEMENT PRODUCTS, INC.

and

BRICKLAYERS, MASONS AND PLASTERERS' LOCAL UNION NO. 43 OF THE FINGERLAKES REGION

Michael Cooperman, Esq., for the General Counsel.
Allan Dabrow, Esq. (Pechner, Dorfman, Wolffe, Rounick & Cabot), of Philadelphia, PA, for the Respondent.
James R. LaVaute, Esq. (Blitman & King), of Syracuse, NY, for the Charging Party.

DECISION

Statement of the Case

RICHARD L. DENISON, Administrative Law Judge: This case was heard at Rochester, New York, on June 18, 19, and 20, 1980, based on an original charge filed by Bricklayers, Masons and Plasterers' Local Union No. 43 of the Fingerlakes Region on December 4, 1979, and amended December 20, 1979.[1] The complaint, issued January 11, 1980, alleges that, after having recognized the Union on November 28, the Respondent violated Section 8(a)(5) and (1) of the Act on or about November 29 by refusing, and thereafter continuing to refuse, to bargain collectively with the Union as the exclusive representative of Respondent's employees in an appropriate

1. All dates are in 1979 unless otherwise specified.

unit composed of all garagemen, truckdrivers, plant employees, and yardmen, excluding all salesmen, the dispatcher, guards and supervisors as defined in the Act.

Upon the entire record in the case, including my observation of the witnesses and consideration of the briefs, I make the following:

Findings of Fact

I. Jurisdiction

As alleged in the complaint and admitted in the answer, as amended, I find that the Respondent is, and has been at all times material herein, a New York corporation having its principal office and place of business at Newark Street, Phelps, New York, where it is engaged in the manufacture, sale, and distribution of building cement blocks, and related products. Annually, in the course and conduct of its business operations, the Respondent purchases, transfers, and delivers to its Phelps plant, sand, gravel, cement, and other goods and materials valued in excess of $500,000, of which goods and materials valued in excess of $50,000 were transported to the Phelps, New York, plant from enterprises outside the State of New York which in turn received said goods and materials directly from states other then the state of New York. I find that the Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. Labor Organization

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

The Respondent is a manufacturer of concrete blocks, and a retail hardware and masonry supplier to

contractors and the general public. Credited testimony by Respondent's President Philip Haers, Jr. described Respondent's operation as follows: Outside suppliers deliver by truck and unload cement for use in the Respondent's automated block machine, attended by a machine operator. This machine manufactures the cement blocks which are then moved on pallets to a kiln by a lift truck driver. The finished blocks are then again moved by yard employees for storage in the yard area until sold. Sales are made and orders are filled by Phelps' sales employees and are delivered by Respondent's drivers utilizing Respondent's own trucks.[2] Credited testimony by William Shattuck, a Phelps block plant employee at the time of the events in question, and James Walters, business representative for Local 43, sets forth the details of the Union's organizational drive. Walters and Shattuck were bowling companions. It was in late October while bowling that Shattuck first approached Walters about the possibility of organizing Phelps. Walters expressed interest, but it was not until early November, after Shattuck assessed dissatisfaction among his fellow employees based on the amount of their annual raise, that Shattuck obtained a supply of authorization cards from Walters and began soliciting signatures in and around the plant.[3] At a union meeting at Shattuck's home on November 13, attended by Shattuck, Joseph Schetrompf, Ernest Tillman and William Leisenring, Walters ex-

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2. The record establishes that the Haers family who compose the principal owners and management of Phelps Cement Products, Inc., also own and operate another company, Phelps Guide Rail, Inc., utilizing totally different management and employees. Phelps Guide Rail, Inc. is not involved in this proceeding.

3. The cards, introduced into evidence without objection, were headed "Authorization For Representation," and contained the wording, "I, the undersigned, hereby authorize the BRICKLAYERS, and ALLIED CRAFTSMEN LOCAL UNION NO. 43, 262 Exchange Street, Geneva, New York, 14456, as my collective bargaining representative for all matters pertaining to wages, benefits, and working conditions."

plained that the purpose of the cards was union representation and to protect their jobs in case anything came up with the Company, because it was unlawful to fire them for union activity. After collecting the cards he secured at the meeting and those obtained by Shattuck earlier, Walters announced that they had a majority and that he would seek recognition from the Company, but that if recognition was denied they only needed 30 percent to have an NLRB election.[4]

On November 28 Walters arrived at the Company at approximately 2 p.m. He was alone. Walters had in his possession 10 authorization cards.[5] Walters entered the Phelps office and asked to see Phil Haers. The man behind the desk, later identified as Charles Haers, inquired concerning Walters' business, and received the response that it was union business. After a minute's delay, while Charles left the reception area and entered the main office, Walters was directed to the office of Philemon Haers, Sr.[6] Walters introduced himself as business representative of Local 43, and stated that he was there representing a majority of Phelps' employees. Haers, Sr. responded, with reference to some papers on his desk, that he was working on a pension plan that had taken many years to develop, which he now supposed was go-

4. None of the employee card signers who testified claimed that they were coerced in any way into signing, or that the card would be used only to secure an election. Those who remembered only being told that the card would protect their jobs also acknowledged that they knew that the card authorized a union to represent them.

5. Counsel for General Counsel introduced into evidence nine authorization cards bearing the signatures of employees Joseph Schetrompf, Frederick E. Little, William C. Leisenring, William M. Shattuck, Jr., Hector Caraballo, Harold McAllister, Orville G. Dates, Ernest Tillman and Ross H. Wilck. I find these cards to be authentic and valid, and, under the circumstances described hereafter, constituted a majority of the employees in an appropriate unit.

6. Philemon Haers, Sr., also frequently referred to as Phil, Sr., was at all times material herein chairman of the Respondent's board of directors. Charles Haers, his brother, was and is employed as Phelps' dispatcher.

ing to go down the drain. Walters answered that this was not necessarily the case, just because the Union represented his employees, since a pension plan and welfare benefits were a matter for collective bargaining. Then Walters stated that he had authorizations from the employees and that Haers, Sr. had the prerogative of either looking at the authorizations and recognizing the Union, or not recognizing them and going to an election. Haers, Sr. stated that he preferred an election. He asked if Guide Rail employees should be included, but Walters replied he understood Guide Rail was a separate corporation currently represented by other unions. Haers, Sr. asked about secretaries, and Walters responded that secretaries were not included in the unit, nor were salespeople. Then Walters asked what was the advantage of going to an election when he had a majority. Walters said that he had 10 cards with him, plus two other employees committed to sign. He stated that if they went to an election it would only delay things, and could result in more difficult negotiations. Then Haers, Sr. asked to see the authorization cards. Walters produced the cards in his possession, placing them on the desk where Haers, Sr. went through them.

Up until this point Walters and Haers, Sr. had been alone in the office, but now Phil Haers, Jr. arrived. He asked what the Bricklayers were doing there. Haers, Sr. answered that the Union had authorizations from a majority of their employees, and wanted to negotiate a contract. Haers, Jr. asked if the Bricklayers normally got "... involved in this type of thing?" Walters answered that they had never represented plant people, but that the employees had come to them and asked for representation and that was how they got involved. He said that it was not unusual for their International to represent other types of workers, and that they had several block plants and even a milk plant. There followed some discussions between the two Haers concerning whether they should accept the authorizations or have an elec-

tion. Haers, Jr. asked his father what he thought, and Haers, Sr. replied that he couldn't see at this point the advantage of going to an election. He said it would only delay things. He stated possibly they were better off with the Bricklayers rather than the Teamsters. After some further conversation between the two Haers speculating about what prompted the employees to want the Union, the Haers went through the authorization cards together. Then Phil Haers, Sr. said he didn't exactly know how many employees were on the payroll at present, and Phil, Jr. asked if they could take 2 or 3 days to think the matter over. Walters said no, that he wanted an answer that day before he left the office. Walters stated that if they were going to recognize the Union, it was fine, but that if they weren't he wanted to petition immediately in the morning for an election. At that point Phil, Sr. asked if Walters would mind leaving the room while he and his son talked the matter over. Walters agreed and went to the outer office as Haers, Sr. called to his payroll clerk to bring in the payroll book. She entered, closing the door, as Walters exited.

After 5 or 6 minutes Walters was invited back inside the office where he found the two men discussing who the unit employees would be. Walters produced a list of employees' names he had compiled, classified by the sections of the plant in which they worked and their payroll numbers.[7] Walters proceeded to read the list of names while the payroll clerk verified it against the payroll book. This comparison revealed only two discrepancies. James Tillman, one of Walters' 10 card signers, had quit his employment at the Company sometime between when he signed the card and Walters' visit to the plant that day. Eric Van Doyan, who was not a card signer, but appeared on Walters' list as a garage employee, was confirmed to be an employee of Guide

7. This list was introduced into evidence as General Counsel's Exhibit No. 3.

Rail. After noting that supervisors, secretaries and clerical workers, and salesmen were not considered part of the unit, Phil Haers, Sr. announced that there were 16 employees.[8]

After the payroll clerk left the room Phil Haers, Jr. inquired about what the next step would be if the Respondent recognized the Union. Walters answered that he would ascertain what the employees' feelings were concerning the Union's contract proposals, and would prepare and forward a basic contract proposal to the Company. Following some further discussion between the Haers with respect to negotiations, Phil Haers, Sr. said "Well, I guess we might as well go ahead and get it over with." At that point the discussion turned to the topic of negotiations. Phil Haers, Jr. expressed concern over beginning negotiations during the Company's busy season immediately prior to the Christmas holidays. He said he would like negotiations to begin, if possible, in January or February, and then in the evening. Walters answered that by the time he had assembled an employee bargaining committee, and had formulated and forwarded their contract proposals to the Company, with an opportunity for the Haers to review those proposals, it would more than likely require that the first meeting be held sometime in January. Walters emphasized that he did not want to interfere with the Company's operations. After answering some questions from the Haers with respect to why the employees wanted a union, Walters asked if they had any written information on company benefits. Phil Haers, Sr. described the existing employee

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8. These were garage employees Harold Smith and Wayne Stone; truckdrivers Fred Sapp, Thomas Rieke, Walter Jaycox, Issac Suwyn, Joseph Schetrompf, and Harold McAllister; plant employees Hector Caraballo, William N. Shattuck, Jr., and Orville Dates; and yard employees William Leisenring, Ernest Tillman, Ross Wilck, and Fred Little. The 16th employee, whom Walters could not remember since that name did not appear on his list, was raised by the Company during the examination of the payroll book.

benefits. Phil Haers, Jr. promised to try to locate an extra copy of the Company's pension, profit-sharing, and welfare program which he would forward to Walters. Then Phil Haers, Sr. said "Just because we agree to negotiate does not mean we have to accept their proposals." Walters responded this was true, proposals were a matter for negotiations, and that Local 43's other contracts contained a binding arbitration provision in the event of a bargaining impasse. He said, if it was acceptable to the Haers, they could do the same thing in these negotiations, and both company officials expressed interest in this idea. The meeting adjourned, and Walters left the office at about 20 minutes until 5 p.m.

In their testimonies Phil Haers, Sr. and Phil Haers, Jr. denied that they agreed to recognize the Union during the meeting with Walters on November 28. Both men insisted that throughout the course of the meeting they consistently took the position that the bargaining unit was larger than 16 employees, and that all eligible employees should have an opportunity to vote in an election. They testified that the authorization cards, which they counted, were Xerox copies of handwritten authorizations, which did not contain either the name of the Union or the heading "Authorization For Representation." Philip Haers, Jr. conceded, however, that at some point in the meeting his father stated that they would be better off with Walters' union than the Teamsters, and also said that just because he recognized the Union it would not mean that he had to accept their proposals. Both Haers agreed that the conference with Walters lasted in the vicinity of 2 hours and that the discussion covered a wide variety of topics as Walters attempted" . . . to sell us on the Union." Phil Haers, Jr.'s testimony noticeably omits any details of that portion of the conference which took place following the discussion of which employees, based on the payroll book, should be included in the bargaining unit. This was the portion of

the meeting in which Walters testified the subject of commencing negotiations was discussed. Likewise, Phil Haers, Sr. in his testimony, omitted any detailed reference to this substantial segment of the conference, until elicited by Respondent's counsel by a leading question. Therefore, in all cases where their respective testimonies conflict, I credit Walters' more detailed and comprehensive version, and find that the Respondent recognized the Union during the November 28 meeting as collective-bargaining representative for an agreed upon 16-employee unit composed of garagemen, truckdrivers, and plant and yard employees, as alleged.

It is undisputed that immediately following the November 28 meeting with Walters, Phil Haers, Sr. and Phil Haers, Jr. convened a special meeting of the board of directors. Phil Haers, Jr. told the assembled members Walters had been there, and" . . . that he had cards with the signatures of the employees, wanting them as their representative; and there has to be a decision made whether to accept that on that basis or a decision made whether to give all the employees a chance to vote." After some deliberation, the meeting ended with Phil, Jr. being instructed to note to call Walters the following day and tell him that the Company wanted an election. Phil Haers, Jr. talked to Walters by telephone the following morning. In response to his statement that there would have to be an election. Walters replied "I don't think you can do that. I will see about that." Walters then stated that he would have to contact his attorney, and the conversation ended.[9] It is therefore clear, and I find, that the Respondent reneged on its original recognition of the Union as exclusive collective-bargaining agent for an appropriate unit of the Respondent's employees. Thus, the Respondent violated Section 8(a) (5) and (1) of the

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9. Based on an amalgam of the credited testimony of Walters and Phil Haers, Jr.

Act.[10] *Lyon & Ryan Ford, Inc.*, 246 NLRB No. 2; *Jerr-Dan Corp.*, 237 NLRB 302.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All garagemen, truckdrivers, plant employees, and yardmen, excluding all salesmen, the dispatcher, guards and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Beginning on November 13, the Union represented a majority of the employees in the appropriate unit described above in paragraph 3, and has been, and is, the exclusive representative of all said employees for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. On November 28 the Respondent recognized the Union as the representative for purposes of collective bargaining of the employees in the appropriate unit described in paragraph 3.

6. By withdrawing recognition from and refusing to bargain collectively with the Union as exclusive collective-bargaining representative of the employees described in the appropriate unit set forth above in paragraph 3, beginning November 28 and continuing to date, the Respondent engaged in unfair labor practices within the meaning of Section 8(a) (5) and (1) of the Act.

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10. Having found that the Respondent did in fact recognize the Union on November 28, and that the 16-man unit discussed in the Walters-Haers conference is an agreed upon appropriate unit, I find it unnecessary to decide whether or not, based on their credited testimony concerning their duties, Phelps' employees Earl Hence, Charles Haers, Michael Melito, and Charles Burmaster, should also be included in the unit.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order that the Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Having found that the Respondent withdrew its recognition of the Union and refused to bargain collectively in good faith with the exclusive representative of its employees in the appropriate unit described herein, I shall order the Respondent to restore recognition to and, upon request, bargain with the Union as the exclusive representative of the employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement. Because the character of the Respondent's unfair labor practices was clearly directed towards the destruction of any collective-bargaining relationship with the Union, I find a broad cease and desist order is necessary. In addition, the Respondent will be ordered to post an appropriate notice encompassing the violations committed.

Upon the foregoing findings of fact and conclusions of law, upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[11]

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11. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

The Respondent, Phelps Cement Products, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize, meet, and bargain collectively with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit.[12]

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Restore recognition to, and, upon request, bargain with Bricklayers, Masons and Plasterers' Local Union No. 43 of the Fingerlakes Region, as the exclusive collective-bargaining agent of the employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Phelps, New York, plant copies of the attached notice marked "Appendix."[13] Copies of said notice, on forms provided by the Regional Di-

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12. The appropriate collective-bargaining unit is:

All garagemen, truckdrivers, plant employees, and yardmen, excluding all salesmen, the dispatcher, guards and supervisors as defined in the Act.

13. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

rector for Region 3, after being duly signed by an authorized representative of the Respondent, shall be posted by it immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C. March 9, 1981

Richard L. Denison
Administrative Law Judge

Appendix D
National Labor Relations Act
29 U.S.C. §§ 151, 157, 158(a) (5), and 159(c)

Section 151
FINDINGS AND DECLARATION OF POLICY

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Section 157
RIGHT OF EMPLOYEES AS TO ORGANIZATION

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a) (3) of this title.

Section 158
UNFAIR LABOR PRACTICES

(a) It shall be an unfair labor practice for an employer — (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 159
REPRESENTATIVES AND ELECTIONS

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board — (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;
the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.